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# ANTARCTICA'S FROZEN TERRITORIAL CLAIMS: A MELTDOWN PROPOSAL

JILL GROB\*

**Abstract:** Antarctica has been a site of peace and scientific exploration for the last fifty years, largely due to a series of agreements known collectively as the Antarctic Treaty System (ATS). But the continent is not free from potential conflicts. A key compromise for ATS parties was the “freezing” of various countries’ territorial claims. However, these territorial claims did not go away, but merely remained hidden beneath the surface of future policies. The author argues that continued suppression of these claims will not further ATS party goals for Antarctica: peace, no military activity, and scientific inquiry. Since many countries rely on oil for their energy needs, Antarctica may become more desirable for commercial exploitation if current sources become too expensive. Therefore, latent territorial claims could seriously undermine continued compromise by ATS parties. Regrettably and unnecessarily, the environment, scientific advances, and international peace would all be placed at great risk.

## INTRODUCTION

Antarctica is a barren continent consisting of very little plant or animal life, and almost no human activity except for the research activities of the scientists that work there.<sup>1</sup> As a scientific resource, Antarctica is vast and valuable,<sup>2</sup> but beyond that it is a very undesirable place for human habitation.<sup>3</sup> With its harsh temperatures and a top layer of “land” consisting of glacial ice, Antarctica does not possess an indigenous population, nor a population that has attempted to colonize and settle the area.<sup>4</sup>

These factors have not prevented some countries from trying to claim sovereignty over parts of Antarctica.<sup>5</sup> Though inhospitable, Ant-

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<sup>1</sup> See CHRISTOPHER C. JOYNER, GOVERNING THE FROZEN COMMONS 5–6, 20 (1998).

<sup>2</sup> See R.M. Laws, *Scientific Opportunities in the Antarctic*, in THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES 28, 28 (Gillian D. Triggs ed., 1987).

<sup>3</sup> KEITH SUTER, ANTARCTICA: PRIVATE PROPERTY OR PUBLIC HERITAGE? 15 (1991).

<sup>4</sup> JOYNER, *supra* note 1, at 20; Laws, *supra* note 2, at 28; SUTER, *supra* note 3, at 15.

<sup>5</sup> See generally JOYNER, *supra* note 1, at 14–19.

arctica contains the possibility of vast riches in the form of mineral resources.<sup>6</sup> In the early part of the twentieth century, seven countries made competing claims to areas of Antarctica.<sup>7</sup> Spanning the globe, these claimants included Chile, Argentina, France, Norway, Great Britain, New Zealand, and Australia.<sup>8</sup> In the wake of World War II and with Cold War hostilities on the rise, non-claimant nations like the United States and the Soviet Union showed increased interest in the disputed territory as well.<sup>9</sup> To alleviate the conflict, all nine of these countries, along with Belgium, Japan, and South Africa, negotiated the Antarctic Treaty in Washington, D.C. on December 1, 1959.<sup>10</sup> It went into force in June of 1961.<sup>11</sup> The Treaty did not parse out the competing sovereignty claims.<sup>12</sup> Instead, it established a system of joint-governance by the Treaty parties.<sup>13</sup>

Nonetheless, the sovereignty issue was not completely ignored.<sup>14</sup> Article IV of the Antarctic Treaty resolved the competing sovereignty claims by, in essence, suspending resolution of the claims until some indefinite future date.<sup>15</sup> Thus, for the moment, member countries have agreed to quiet their sovereignty claims in the greater interest of the articulated goals of the Treaty.<sup>16</sup> The territorial claims, therefore, have merely been "frozen."<sup>17</sup> These claims could resurface at any time should a party to the Treaty wish to rekindle its claim.<sup>18</sup> Rekindling a

<sup>6</sup> EMILIO J. SAHURIE, *THE INTERNATIONAL LAW OF ANTARCTICA* 433 (1992).

<sup>7</sup> JOYNER, *supra* note 1, at 14.

<sup>8</sup> JEFFREY D. MYHRE, *THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY* 12-15 (1986).

<sup>9</sup> See CHRISTOPHER C. JOYNER & ETHEL R. THEIS, *EAGLE OVER THE ICE* 26 (1997).

<sup>10</sup> Christopher D. Beeby, *The Antarctic Treaty System: Goals, Performance and Impact: The Antarctic Treaty as a Conflict-Avoidance Mechanism*, in *THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS* 4, 5 (Arnfinn Jørgensen-Dahl & Willy Østreng eds., 1991). See generally *The Antarctic Treaty* art. IV, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 [hereinafter *Antarctic Treaty*].

<sup>11</sup> SUTER, *supra* note 3, at 19.

<sup>12</sup> See Rolph Trolle-Anderson, *The Antarctic Scene: Legal and Political Facts*, in *THE ANTARCTIC TREATY REGIME: LAW ENVIRONMENT AND RESOURCES*, *supra* note 2, at 60.

<sup>13</sup> See JOYNER & THEIS, *supra* note 9, at 34; M.J. PETERSON, *MANAGING THE FROZEN SOUTH* 41 (1988).

<sup>14</sup> See JOYNER & THEIS, *supra* note 9, at 34.

<sup>15</sup> *Antarctic Treaty*, *supra* note 10, art. IV; see Beeby, *supra* note 10, at 6 (explaining that the Treaty sets the sovereignty issue to the side).

<sup>16</sup> See Beeby, *supra* note 10, at 7.

<sup>17</sup> SAHURIE, *supra* note 6, at 185; see SUTER, *supra* note 3, at 9.

<sup>18</sup> See SAHURIE, *supra* note 6, at 303 (highlighting the complexities of territorial claims if the Treaty ever ceases to be in force).

claim, however, would violate Article IV of the Antarctic Treaty.<sup>19</sup> Such a violation could threaten the delicate balance that holds Treaty parties together and perhaps cause the entire Treaty system to collapse.<sup>20</sup>

Although preserving these sovereignty claims may have been a brilliant political compromise in 1959, it poses problems for 2007 and beyond.<sup>21</sup> Part I of this Note explains the history of territorial claims to Antarctica, the history of the Antarctic Treaty, and how the issues of mineral resource activity and territorial sovereignty have been treated in the past. Part II explains competing theories relating to Antarctica and their application to the sovereignty and mineral resource dilemma. Part III weighs the costs and benefits of eliminating the frozen territorial claims and proposes that they should be eliminated from the Treaty. If the three goals of the 1959 Treaty are truly the goals to which the Treaty parties aspire, then this solution will assure that the Treaty manifests in practice what it aspires to do in its text.<sup>22</sup> This solution serves the current interest in protecting the Antarctic environment, and the world environment, from the harms of mining in Antarctica.<sup>23</sup> If the situation were to change in the future and Antarctica were to become a necessary source of mineral resources for the world's people,<sup>24</sup> Antarctica's de-claimed status would better facilitate a plan for mining the resources.<sup>25</sup> Without any national interests at stake—with all the potential and actual territorial claims eliminated—Treaty parties could best negotiate a solution for resource allocation that is in the interest of all nations.<sup>26</sup>

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<sup>19</sup> See Antarctic Treaty, *supra* note 10, art. IV(2) (proclaiming that "[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force").

<sup>20</sup> See Beeby, *supra* note 10, at 18.

<sup>21</sup> See Arnfinn Jørgensen-Dahl & Willy Østreng, *Introduction: The Antarctic Challenge*, in THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS, *supra* note 10, at 1.

<sup>22</sup> See Antarctic Treaty, *supra* note 10, arts. I-III. But see Trolle-Anderson, *supra* note 12, at 59.

<sup>23</sup> See JOYNER & THEIS, *supra* note 9, at 139.

<sup>24</sup> See Geoffrey Larminie, *The Mineral Potential of Antarctica: The State of the Art*, in THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS, *supra* note 10, at 91; see also PETERSON, *supra* note 13, at 13 (explaining the importance of changing technologies in the Antarctic context); EIA, Country Analysis Briefs, Antarctica: Fact Sheet, <http://www.eia.doe.gov/emeu/cabs/antarctica.html> ("Antarctica's serenely primitive wilderness faces an uncertain future as debate continues over the question of tapping into the continent's wealth of mineral resources.") (last visited Apr. 24, 2007).

<sup>25</sup> See SAHURIE, *supra* note 6, at 439–40 (noting that increased outside interest in exploiting oil resources in Antarctica led to interest by Treaty parties to address the issue).

<sup>26</sup> Joe Verhoeven, *General Introduction*, in THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW 11, 14 (Joe Verhoeven et al. eds., 1992); see *infra* Part III.D.

## I. BACKGROUND

### A. *History of Claims to Antarctica*

Britain was the first country to claim sovereignty over an area of Antarctica in 1908.<sup>27</sup> New Zealand advanced the next claim in 1923, followed by France in 1924.<sup>28</sup> The next claims were made by Australia in 1933, Norway in 1939, and Chile in 1940.<sup>29</sup> Argentina made a series of claims starting in 1927, refining its claim up until 1957.<sup>30</sup> These countries proposed a variety of justifications for their claims, including discovery, occupation, geographical proximity, geographical affinity, and sector theories.<sup>31</sup> Regardless of the justifications for the claims, all seven of these claims manifest the idea that Antarctica is a space that *can* be claimed.<sup>32</sup>

All seven of the aforementioned claimant countries were parties to the 1959 Antarctic Treaty.<sup>33</sup> The five non-claimant nations that rounded out the parties to the 1959 Treaty were Belgium, Japan, South Africa, the Soviet Union, and the United States.<sup>34</sup> Of those five countries, the Soviet Union and the United States reserved the right to make claims in the future, which was acknowledged in Article IV of the Treaty.<sup>35</sup> Thus, the Soviet Union and the United States occupy a middle ground between the seven pure claimant states and the three other non-claimant states.<sup>36</sup> Of the seven claimant states, only Australia, New Zealand, Norway, France, and Great Britain recognize the claims of the others.<sup>37</sup> The United States and Soviet Union, however, abide by a “no claims” principle, whereby they assert no claims and acknowledge no claims by others, while still reserving the right to make future claims.<sup>38</sup> The three other non-claimant countries agreed to the frozen claims

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<sup>27</sup> SUTER, *supra* note 3, at 16.

<sup>28</sup> MYHRE, *supra* note 8, at 14–15.

<sup>29</sup> *Id.* at 13–15.

<sup>30</sup> *Id.* at 12–13.

<sup>31</sup> *See generally id.* at 7–15.

<sup>32</sup> PETERSON, *supra* note 13, at 35.

<sup>33</sup> *Id.* at 40–41.

<sup>34</sup> *Id.*

<sup>35</sup> Antarctic Treaty, *supra* note 10, art. IV(1)(a) (explicitly reserving such rights); SUTER, *supra* note 3, at 16.

<sup>36</sup> *See* SUTER, *supra* note 3, at 16.

<sup>37</sup> Gillian D. Triggs, *Introduction*, in THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES, *supra* note 2, at 52.

<sup>38</sup> SUTER, *supra* note 3, at 16; *see* JOYNER & THEIS, *supra* note 9, at 39–40.

and did not acknowledge the claims of claimant-countries, yet did not reserve a right to advance future claims.<sup>39</sup>

Additional nations have ratified the Treaty over the years, including India and China in 1983, and Cuba in 1984.<sup>40</sup> By ratifying the Treaty, these countries agreed to the compromise in Article IV to freeze past territorial claims and also agreed not to advance any new claims of their own.<sup>41</sup> Some developing nations, however, as well as the United Nations (U.N.), have expressed the view that Antarctica is the type of territory that cannot be claimed by any nation.<sup>42</sup> Even some of the original treaty parties that made claims in the past now agree with this viewpoint.<sup>43</sup> A variety of justifications exist for the idea that Antarctica should remain unclaimed, ranging from the philosophical to the practical.<sup>44</sup> The philosophical reason advanced is that Antarctica is a "global commons," meaning that the territory cannot be owned by any one nation, but rather is owned, in a sense, by all nations.<sup>45</sup> The more practical reason is that Antarctica is a large area within which the potential for environmental damage is great, with detrimental effects that could reach all nations of the world.<sup>46</sup> Under this view, Antarctica should be designated as a "world park" so that all nations can benefit from the positive effects of its preservation.<sup>47</sup>

### B. *History of Mineral Resources in Antarctica*

Beyond its scientific value, Antarctica has the potential to become a commercial resource as well.<sup>48</sup> Geological evidence suggests that Ant-

<sup>39</sup> Davor Vidas, *The Antarctic Treaty System in the International Community: An Overview*, in GOVERNING THE ANTARCTIC 35, 36–37 n.5 (Olav Schram Stokke & Davor Vidas eds., 1996) [hereinafter *Overview*]; JOYNER & THEIS, *supra* note 9, at 36.

<sup>40</sup> See FRANCISCO ORREGO VICUÑA, ANTARCTIC MINERAL EXPLOITATION: THE EMERGING LEGAL FRAMEWORK 533–39 (1988) (featuring a table listing all parties and the additional Antarctic measures that they ratified).

<sup>41</sup> See JOYNER, *supra* note 1, at 61.

<sup>42</sup> See *id.* at 247; MYHRE, *supra* note 8, at 113.

<sup>43</sup> See G.A. Res. 45/78, Preamble, U.N. Doc. A/RES/45/78 (Dec. 12, 1990) ("Welcoming the initiative taken by some Antarctic Treaty Consultative Parties in promoting Antarctica as a nature reserve or world park and the banning of prospecting and mining in and around Antarctica . . .").

<sup>44</sup> See JOYNER, *supra* note 1, at 25–26.

<sup>45</sup> See *id.*

<sup>46</sup> JOYNER & THEIS, *supra* note 9, at 139; see Jorge Berguno, *The Antarctic Park: The Issue of Environmental Protection*, in THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW, *supra* note 26, at 106.

<sup>47</sup> See JOYNER, *supra* note 1, at 175; PETERSON, *supra* note 13, at 118.

<sup>48</sup> Convention on the Regulation of Antarctic Mineral Resource Activities Preamble, opened for signature Nov. 25, 1988, *reprinted in* 27 I.L.M. 868 (1988) (noting the possibility

arctica may contain vast stores of oil.<sup>49</sup> The U.S. economy is particularly dependent upon this resource.<sup>50</sup> The Antarctic Treaty was silent on how to treat the discovery of mineral resources such as oil for the same reason it was silent on solving the sovereignty issue—the conflicts over how to resolve both issues were too difficult to tackle in the Cold War political climate.<sup>51</sup> The fragile status of competing sovereignty claims would complicate resolution of the mineral resource issue, since interests could easily overlap or collide.<sup>52</sup> Historically, it has not been commercially viable to search for these resources in Antarctica due to the climatic conditions and the current perception that the chance of discovery is slight.<sup>53</sup> Scientific studies on the continent, however, could incidentally unearth discoveries of commercial value.<sup>54</sup> If a mineral resource were discovered in a particular area, it seems very likely that a country that had shelved its sovereignty claim to that area in 1959 might attempt to reassert its claim.<sup>55</sup>

### C. Underlying Issues: Politics and Science

Of the seven claimed areas of Antarctica, only the territorial claims of Britain, Argentina, and Chile overlap.<sup>56</sup> While the other four claims do not overlap, the Antarctic areas in which Britain, Argentina, and Chile made competing claims cover one fifth of the Antarctic continent.<sup>57</sup> During the 1940s and 1950s, these overlapping areas created tension and led countries like the United States to fear that the dispute could give rise to war.<sup>58</sup> Signs pointed in that direction.<sup>59</sup> A few war-like

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that exploitable mineral resources may exist in Antarctica) [hereinafter CRAMRA]; SAHURIE, *supra* note 6, at 424, 427.

<sup>49</sup> See JOYNER & THEIS, *supra* note 9, at 136. *But see* Larminie, *supra* note 24, at 86 (explaining that Antarctica does not have great petroleum potential in comparison to other areas of the world).

<sup>50</sup> See SUTER, *supra* note 3, at 1.

<sup>51</sup> Beeby, *supra* note 10, at 5; SAHURIE, *supra* note 6, at 433.

<sup>52</sup> JOYNER & THEIS, *supra* note 9, at 35.

<sup>53</sup> Larminie, *supra* note 24, at 82 (explaining that mineral resource exploration in Antarctica is prohibitively expensive); MYHRE, *supra* note 8, at 27 (explaining that the United States believed at the time the Treaty was negotiated that the economic value of Antarctica was negligible).

<sup>54</sup> Beeby, *supra* note 10, at 8 (explaining that it will always be rumored that science is merely a cover for “other national ambitions”). *See generally* SAHURIE, *supra* note 6, at 352–56 (relying on the implicit assumption that the status of these mineral resources has been discovered through scientific inquiry).

<sup>55</sup> See PETERSON, *supra* note 13, at 2.

<sup>56</sup> SUTER, *supra* note 3, at 16.

<sup>57</sup> MYHRE, *supra* note 8, at 14.

<sup>58</sup> *See* Beeby, *supra* note 10, at 5.

scuffles occurred in the southern hemisphere among the three claimant states from 1947–48.<sup>60</sup> From a political standpoint, the United States became concerned that it would need to choose sides.<sup>61</sup> All three of the countries were U.S. allies, and the United States did not want to make a choice between friends.<sup>62</sup>

Antarctica was also a site of Cold War political strain.<sup>63</sup> Both the United States and the Soviet Union established bases on Antarctica for various pursuits.<sup>64</sup> To strengthen its presence in Antarctica, the United States began to train military personnel and test equipment in Antarctic conditions in 1946–47.<sup>65</sup> The United States was not the only country that was feeling insecure about the military status of Antarctica.<sup>66</sup> Australia, for example, was fearful of the Soviet Union's increasing presence in Antarctica, especially after Soviet scientists raised the Soviet flag over a scientific base established in a part of Australia's Antarctic claim.<sup>67</sup> The action of the Soviet scientists did not concern the scientists in Antarctica, but it did concern political leaders.<sup>68</sup> Actions in Antarctica by any country were watched with a wary eye by countries on both sides of Cold War politics, even those actions conducted under the auspices of scientific exploration.<sup>69</sup>

Despite these political insecurities, scientists were working to peacefully unite the world through a cooperative research program called the International Geophysical Year (IGY).<sup>70</sup> This program lasted eighteen months, from July 1, 1957 until December 31, 1958.<sup>71</sup> The program consisted of a coordinated effort among scientists to study the entire natural world.<sup>72</sup> Because of its success, the program was extended an additional year, although its name changed to International Geophysical Cooperation (IGC)-1959.<sup>73</sup> In Antarctica, the activities of

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<sup>59</sup> See MYHRE, *supra* note 8, at 14.

<sup>60</sup> See *id.*; see, e.g., SUTER, *supra* note 3, at 17.

<sup>61</sup> See JOYNER & THEIS, *supra* note 9, at 149–50.

<sup>62</sup> See *id.*; PETERSON, *supra* note 13, at 54.

<sup>63</sup> Beeby, *supra* note 10, at 5.

<sup>64</sup> See LORRAINE M. ELLIOTT, INTERNATIONAL ENVIRONMENTAL POLITICS 28 (1994); MYHRE, *supra* note 8, at 31.

<sup>65</sup> ELLIOTT, *supra* note 64, at 28.

<sup>66</sup> See MYHRE, *supra* note 8, at 31.

<sup>67</sup> *Id.*; see SUTER, *supra* note 3, at 18.

<sup>68</sup> See SUTER, *supra* note 3, at 18.

<sup>69</sup> See PETERSON, *supra* note 13, at 68.

<sup>70</sup> SUTER, *supra* note 3, at 18.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MYHRE, *supra* note 8, at 31.



scientists participating in the IGY took place at fifty different scientific bases, and were conducted by twelve different countries.<sup>74</sup> Out of this background of political fears and scientific aspirations, the Antarctic Treaty of 1959 took shape.<sup>75</sup>

#### D. *The Antarctic Treaty and Its Progeny*

The United States initiated the Antarctic Treaty by inviting the eleven other interested countries to Washington, D.C. to discuss the matter.<sup>76</sup> The Antarctic Treaty articulated three main goals: first, to promote peace in Antarctica; second, to ensure that Antarctica would not be used for military activity; third, to encourage scientific research in Antarctica.<sup>77</sup> The first two goals stemmed from sovereignty conflicts and Cold War concerns.<sup>78</sup> Peace was important to all Treaty members because none wanted to go to war over the conflicting sovereignty claims.<sup>79</sup> Antarctica also appeared to be a potential site for another Cold War arms race.<sup>80</sup> The United States feared that the Soviet Union would use Antarctica for military purposes.<sup>81</sup> Fortunately, the third goal, of encouraging scientific research, facilitated peace and demilitarization because it would benefit all Treaty parties; the immeasurable benefits of scientific inquiry paved the way for political compromise.<sup>82</sup>

Since its creation, the Antarctic Treaty has evolved to include twenty-six Consultative parties and seventeen Contracting parties.<sup>83</sup> The difference between Consultative and Contracting party status is slight, but significant.<sup>84</sup> The twelve original treaty parties were all granted Consultative party status by the Treaty.<sup>85</sup> Under Article IX, these nations can attend yearly meetings and can vote on policies relating to

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<sup>74</sup> SUTER, *supra* note 3, at 18.

<sup>75</sup> MYHRE, *supra* note 8, at 31–32.

<sup>76</sup> PETERSON, *supra* note 13, at 40.

<sup>77</sup> Antarctic Treaty, *supra* note 10, arts. I–III.

<sup>78</sup> See JOYNER & THEIS, *supra* note 9, at 146.

<sup>79</sup> See Trolle-Anderson, *supra* note 12, at 60.

<sup>80</sup> See JOYNER & THEIS, *supra* note 9, at 150.

<sup>81</sup> *Id.* at 26.

<sup>82</sup> See Jonathan I. Charney, *The Antarctic System and Customary International Law*, in INTERNATIONAL LAW FOR ANTARCTICA 51, 91 (Francesco Francioni & Tullio Scovazzi eds., 1996) (describing the Treaty as a quid pro quo with claimant-states agreeing to suspend claims for the benefit of a cooperative agreement); Trolle-Anderson, *supra* note 12, at 59–60.

<sup>83</sup> JOYNER, *supra* note 1, at 49.

<sup>84</sup> See *id.* (noting that Consultative parties can attend meetings and vote on Antarctic issues, while Contracting parties cannot).

<sup>85</sup> Antarctic Treaty, *supra* note 10, art. IX(1); SAHURIE, *supra* note 6, at 11.

Antarctica at those meetings.<sup>86</sup> Article XIII articulates the procedure whereby other nations can become Treaty members.<sup>87</sup> For a nation that ratifies the Treaty to achieve Consultative party status, it must "conduc[t] substantial scientific research activity [in Antarctica]."<sup>88</sup> This requirement indirectly imposes an investment requirement as well.<sup>89</sup> Given its location and climatic conditions, conducting research on Antarctica is expensive.<sup>90</sup> This requirement effectively prohibits developing countries from voting on Antarctic issues, since they cannot meet the monetary demand inherent in Consultative party status.<sup>91</sup> A lesser status, however, can be attained by an interested nation that simply ratifies the Treaty but does not meet the scientific research requirement.<sup>92</sup> This Contracting party status obliges a nation to follow the Antarctic Treaty, but does not allow the nation any voice in Antarctic governance.<sup>93</sup> Seventeen nations have chosen this status,<sup>94</sup> but it is questionable whether that status was a "choice," or dictated by monetary constraints.<sup>95</sup>

The Antarctic Treaty expanded to include Recommendations and policies adopted at yearly meetings, conducted as per the original Treaty articles.<sup>96</sup> Thus, the Treaty became more than just a Treaty, and is often referred to now as the Antarctic Treaty System (ATS).<sup>97</sup> Special conferences were held over the years to develop various Protocols, some of which the Consultative parties eventually ratified.<sup>98</sup> So long as all Consultative parties ratify a protocol, these measures become part of the ATS.<sup>99</sup> Adopted measures have no force until ratified.<sup>100</sup>

<sup>86</sup> Antarctic Treaty, *supra* note 10, art. IX(1); SAHURIE, *supra* note 6, at 11.

<sup>87</sup> Antarctic Treaty, *supra* note 10, art. XIII.

<sup>88</sup> See *id.* art. IX(2); PETERSON, *supra* note 13, at 43.

<sup>89</sup> JOYNER, *supra* note 1, at 48.

<sup>90</sup> *Id.*; see SAHURIE, *supra* note 6, at 9 (describing the U.S. budget in Antarctica).

<sup>91</sup> See Rajmah Hussain, *The Antarctic: Common Heritage of Mankind?*, in THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW, *supra* note 26, at 89.

<sup>92</sup> See MYHRE, *supra* note 8, at 39; SUTER, *supra* note 3, at 23.

<sup>93</sup> See PETERSON, *supra* note 13, at 100–01.

<sup>94</sup> JOYNER, *supra* note 1, at 49.

<sup>95</sup> See PETERSON, *supra* note 13, at 101.

<sup>96</sup> See, e.g., Recommendation XI-1, Antarctic Treaty Consultative Meeting XI, Antarctic mineral resources (1981), available at <http://aspire.nvi.net/gendoc.plx?l1=1981&db=1> [hereinafter Recommendation XI-1 (1981)].

<sup>97</sup> See generally Overview, *supra* note 39, at 35–39.

<sup>98</sup> See, e.g., Protocol on Environmental Protection to the Antarctic Treaty, special Consultative meeting, 27th Sess., ATSCM/2/3/2, 30 I.L.M. 1455 (1991) [hereinafter Madrid Protocol]; Convention on Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, T.I.A.S. No. 10240 [hereinafter CCAMLR].

<sup>99</sup> See SAHURIE, *supra* note 6, at 11 (explaining the consensus requirement).

The first successful, large-scale addition to the Antarctic Treaty was the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna.<sup>101</sup> Next came the 1972 Convention for the Conservation of Antarctic Seals (Seals Convention).<sup>102</sup> After the Seals Convention entered into force in 1978, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) was discussed in 1980 and was ratified in 1982.<sup>103</sup>

### E. CRAMRA and the Madrid Protocol

The Convention on the Regulation of Antarctic Mineral Resources (CRAMRA) took six years to finalize.<sup>104</sup> Discussions and meetings occurred from 1982–88 and a special Consultative meeting adopted the convention on December 2, 1988 in Wellington, New Zealand.<sup>105</sup> The agreement—the first of its kind—delineated a plan for handling the mining of mineral resources in Antarctica.<sup>106</sup> It was never ratified.<sup>107</sup> Consensus among Treaty members is required for measures to become effective.<sup>108</sup> France and Australia pulled back their support for environmental reasons, thereby preventing CRAMRA from becoming part of the ATS.<sup>109</sup>

Three years later, in 1991, the Consultative parties negotiated the Protocol to the Antarctic Treaty on Environmental Protection, referred to as the Madrid Protocol.<sup>110</sup> This Protocol places a fifty-year moratorium on mining for mineral resources in Antarctica.<sup>111</sup> The Madrid Protocol reflects an entirely different assessment of mineral resources

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<sup>100</sup> See *id.*

<sup>101</sup> JOYNER & THEIS, *supra* note 9, at 44. See generally Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2–13, 1964, 17 U.S.T. 996, T.I.A.S. No. 6058 (1966), modified in 24 U.S.T. 1802, T.I.A.S. No. 7692(1973) [hereinafter Agreed Measures].

<sup>102</sup> See generally Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826 (1976–77) [hereinafter Seals Convention].

<sup>103</sup> ELLIOTT, *supra* note 64, at 91; see generally CCAMLR, *supra* note 98.

<sup>104</sup> JOYNER & THEIS, *supra* note 9, at 108. See generally CRAMRA, *supra* note 48.

<sup>105</sup> JOYNER & THEIS, *supra* note 9, at 108. See generally CRAMRA, *supra* note 48.

<sup>106</sup> See SUTER, *supra* note 3, at 59–60.

<sup>107</sup> See *id.* at 59.

<sup>108</sup> SAHURIE, *supra* note 6, at 11.

<sup>109</sup> See JOYNER & THEIS, *supra* note 9, at 77.

<sup>110</sup> Madrid Protocol, *supra* note 98; JOYNER & THEIS, *supra* note 9, at 179.

<sup>111</sup> JOYNER & THEIS, *supra* note 9, at 180; Francesco Francioni, *Introduction*, in INTERNATIONAL LAW FOR ANTARCTICA, *supra* note 82, at 3.

and the environment.<sup>112</sup> Rather than regulate mining to protect the environment, which CRAMRA tried to do, the Madrid Protocol outright prohibits mining.<sup>113</sup> The ban, however, is not permanent.<sup>114</sup> The Protocol can be amended to lift the mining ban with majority vote by the current Consultative parties within the fifty years immediately following January 14, 1998.<sup>115</sup> After the fifty years expire, the ban can be lifted by a majority of current Consultative parties.<sup>116</sup> While mining is currently prohibited, mining could take place in Antarctica in the future if Treaty parties change their positions.<sup>117</sup>

#### F. *The ATS and the United Nations*

The U.N. would like to play a greater role in Antarctic policy, but the ATS has yet to include it.<sup>118</sup> The twelve initial Treaty parties actually preferred that the system function independent of the U.N.<sup>119</sup> Since the ATS involved exchanging frozen claims for benefits of a unified system, those frozen claims could be threatened if the U.N. took over with its system.<sup>120</sup> Under the ATS, only those nations with a "stake" in Antarctica have a voice in Antarctic policy.<sup>121</sup> The requirement of "substantial scientific research" in Antarctica serves to limit the group of nations that can take part in Antarctic policy-making.<sup>122</sup> In a way, the smaller scale of this governing system has facilitated the many recommendations and policies that the ATS has developed over the years.<sup>123</sup> If it were easier to attain Consultative party status, it would be more difficult for the entire group to achieve consensus on matters.<sup>124</sup>

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<sup>112</sup> Madrid Protocol, *supra* note 98, art. 3(1); Davor Vidas, *The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the Protocol*, in GOVERNING THE ANTARCTIC, *supra* note 39, at 77 [hereinafter *New Dimension*].

<sup>113</sup> *New Dimension*, *supra* note 112, at 77.

<sup>114</sup> JOYNER, *supra* note 1, at 153.

<sup>115</sup> JOYNER & THEIS, *supra* note 9, at 180; *see also* Australian Government Antarctic Division, The Madrid Protocol, Entry Into Force [hereinafter *Entry Into Force*], available at <http://www.aad.gov.au/default.asp?casid=825> (explaining that the parties opened the Madrid Protocol for signature on October 4, 1991, but it did not enter into force until January 14, 1998) (last visited Apr. 24, 2007).

<sup>116</sup> JOYNER & THEIS, *supra* note 9, at 180.

<sup>117</sup> *See* Charney, *supra* note 82, at 89.

<sup>118</sup> G.A. Res. 45/78, *supra* note 43; *see* Hussain, *supra* note 91, at 89, 91.

<sup>119</sup> *See* ELLIOTT, *supra* note 64, at 39.

<sup>120</sup> *See* Charney, *supra* note 82, at 91–92.

<sup>121</sup> *See* JOYNER & THEIS, *supra* note 9, at 175.

<sup>122</sup> *See id.* at 174–75.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 175.

The significant barrier to Consultative status has not stopped developing countries that are members of the U.N. from utilizing the U.N. as a stage to discuss their Antarctic concerns.<sup>125</sup> The U.N. General Assembly has issued various resolutions over the years pertaining to Antarctica.<sup>126</sup> These resolutions reflect a concern that even though scientific research in Antarctica might be cost-prohibitive for some nations, all nations have a stake in the global environment.<sup>127</sup> Insofar as research and other activities in Antarctica could affect the global climate, oceans, and ozone, every nation has a stake.<sup>128</sup> A December 1990 G.A. Resolution recognizes "the particular significance of Antarctica to the international community in terms, inter alia, of international peace and security, environment, its effects on global climatic conditions, economy and scientific research . . . ."<sup>129</sup> Attempts to utilize the U.N. paid off for those nations that thought their voices were not being heard.<sup>130</sup> After the U.N. made Antarctica a talking point in the early 1980s, the non-Consultative parties were granted access to regular and special Consultative meetings.<sup>131</sup> U.N. power, however, is limited.<sup>132</sup> Although the U.N. Security Council could issue binding resolutions pertaining to Antarctica, as opposed to the observational General Assembly resolutions, Consultative parties in the U.N. could easily exercise a veto.<sup>133</sup> A transfer of power from the ATS to the U.N. would not sit well with Consultative parties, thus the veto would probably be exercised.<sup>134</sup>

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<sup>125</sup> See SUTER, *supra* note 3, at 78–86 (discussing U.N. Resolutions from developing countries regarding Antarctica).

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., G.A. Res. 46/41, pmbl., U.N. Doc. A/RES/46/41 (Dec. 6, 1991) ("Welcoming the increasing recognition of the significant impact that Antarctica exerts on the global environment and ecosystems and of the need for a comprehensive agreement to be negotiated by the international community . . .").

<sup>128</sup> See *id.* pmbl.

<sup>129</sup> See G.A. Res. 45/78, *supra* note 43.

<sup>130</sup> See Beeby, *supra* note 10, at 15.

<sup>131</sup> See *id.*

<sup>132</sup> See MYHRE, *supra* note 8, at 115.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

## II. DISCUSSION

### A. *Theories of Title*

Claimant states asserted title to Antarctica using a variety of title-acquisition theories.<sup>135</sup> Under international law, however, there is only one manner by which a country may obtain title to Antarctica.<sup>136</sup> Since Antarctica is uninhabited terrain, a country can only acquire title to it by occupation.<sup>137</sup> When occupation is unrealistic or impossible, the mere *will* to act as sovereign will suffice.<sup>138</sup> The inquiry concerning when occupation becomes “unrealistic or impossible” is highly fact-specific.<sup>139</sup> It is disputed whether any country has effectively “occupied” Antarctica to justify a claim to sovereignty, yet claims began to surface at the beginning of the twentieth century.<sup>140</sup>

### B. *Conflicting Theories of Contested Antarctic Territory*

Great Britain's claim was based on inchoate title through discovery, and the perfection of this title through occupation of its scientific bases on Antarctica.<sup>141</sup> Great Britain also utilizes the sector theory to expand its claim beyond the scientific bases it occupies.<sup>142</sup> Under the sector theory, claimants can claim larger areas than they occupy based on proximity.<sup>143</sup> Utilizing coastlines and the meridians, claimants will outline their particular “sector,” extending beyond an area they actually occupy.<sup>144</sup> International law has not validated the sector theory as a legitimate way to acquire title to land.<sup>145</sup> Nonetheless, Great Britain along with Argentina, Australia, Chile, France, and New Zealand all use the theory to claim additional areas.<sup>146</sup> In fact, Norway is the only country of the seven claimant countries to reject this theory.<sup>147</sup>

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<sup>135</sup> See generally *id.* at 7–15.

<sup>136</sup> *Id.* at 8.

<sup>137</sup> See JOYNER, *supra* note 1, at 19.

<sup>138</sup> MYHRE, *supra* note 8, at 11.

<sup>139</sup> See *id.* at 8–11 (outlining three precedential cases that have left the question of how to evince sovereignty in Antarctica unanswered).

<sup>140</sup> SUTER, *supra* note 3, at 16.

<sup>141</sup> MYHRE, *supra* note 8, at 14.

<sup>142</sup> See *id.*

<sup>143</sup> See SAHURIE, *supra* note 6, at 314 (explaining the sector theory in detail).

<sup>144</sup> See *id.*

<sup>145</sup> MYHRE, *supra* note 8, at 12.

<sup>146</sup> See *id.*

<sup>147</sup> *Id.* at 15.

Argentina's claimed area includes the Antarctic Peninsula, an area within Great Britain's claim that is known for its mineral resource potential.<sup>148</sup> In addition to a claim based on occupation, Argentina backed its claim with geographical proximity, referred to as "contiguity," and geographical affinity.<sup>149</sup> Neither of these theories are recognized in international law.<sup>150</sup> The contiguity theory, if recognized, would require the territories of Argentina and Antarctica to be connected.<sup>151</sup> The 700-mile distance between Argentina and the claimed territory is hardly "contiguous."<sup>152</sup> The geographical affinity theory is perhaps even more far-fetched.<sup>153</sup> This theory proposes that the Andes submerge at a certain point in Argentina and then resurface in the south as the Antarctic Peninsula.<sup>154</sup> Thus, even if not contiguous to the naked eye, the lands are still connected by their likeness to one another.<sup>155</sup>

Not until 1940 did Chile officially declare the outlines of the Chilean Antarctic Territory.<sup>156</sup> The decree did not establish new titles, but rather acknowledged pre-existing rights in the area.<sup>157</sup> Chile then established a scientific base in the South Shetland Islands in 1947, an area within Argentina's and Great Britain's claims.<sup>158</sup> Great Britain tried to resolve the issue through international arbitration, but Chile refused the court's jurisdiction.<sup>159</sup> The Antarctic Treaty effectively took the heat off these disputes and froze the claims.<sup>160</sup> Although this did not resolve the underlying disputes, it ensured peace in Antarctica.<sup>161</sup>

### C. *The Mineral Resource Issue*

There are two issues relating to mineral resources in Antarctica: first, whether they exist; and second, whether it is economically viable to extract them.<sup>162</sup> The Gondwanaland hypothesis supports the idea

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<sup>148</sup> SAHURIE, *supra* note 6, at 19.

<sup>149</sup> ELLIOTT, *supra* note 64, at 27.

<sup>150</sup> See JOYNER, *supra* note 1, at 19; MYHRE, *supra* note 8, at 13.

<sup>151</sup> See JOYNER, *supra* note 1, at 19.

<sup>152</sup> See MYHRE, *supra* note 8, at 13.

<sup>153</sup> See JOYNER, *supra* note 1, at 19.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.*

<sup>156</sup> SAHURIE, *supra* note 6, at 23.

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> See Trolle-Anderson, *supra* note 12, at 60.

<sup>161</sup> *See id.*

<sup>162</sup> See SUTER, *supra* note 3, at 48.

that mineral resources exist in Antarctica.<sup>163</sup> Based on this concept, Antarctica used to be part of a larger land mass.<sup>164</sup> Thousands of years ago this larger land mass broke apart, into the seven respective continents.<sup>165</sup> Since mineral resources have been found on the other continents, the hypothesis suggests that Antarctica contains mineral resources as well.<sup>166</sup> Deposits of coal and iron have been found in Antarctica, supporting the hypothesis.<sup>167</sup> Even though it is likely mineral resources exist in Antarctica, their extraction is an entirely different matter.<sup>168</sup>

Extraction of mineral resources in Antarctica can be reduced to simple economic cost-benefit analyses.<sup>169</sup> Antarctica's location and climatic conditions contribute to high projected extraction costs.<sup>170</sup> Studies suggest, however, that the deposits in Antarctica could be quite large, thereby making extraction profitable.<sup>171</sup> The demand for such resources in the market is another factor in this analysis.<sup>172</sup> High demand could increase prices, thus making the extraction more profitable.<sup>173</sup> These variables are all subject to change based on fluctuations in the market for certain mineral resources, especially oil, as well as changing technologies that facilitate extraction in the harsh Antarctic climate.<sup>174</sup> With the adoption of the Madrid Protocol, the ATS prohibits mining.<sup>175</sup> Therefore, whether the minerals exist and, if so, how profitable it might be to extract them, is immaterial until some future time when the ban might be lifted.<sup>176</sup>

#### D. *The Common Heritage of Mankind Principle*

Some developing nations have argued that Antarctica should be considered the "common heritage of mankind" (CHM).<sup>177</sup> This con-

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<sup>163</sup> See JOYNER & THEIS, *supra* note 9, at 135; SAHURIE, *supra* note 6, at 352.

<sup>164</sup> See SAHURIE, *supra* note 6, at 352.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> JOYNER & THEIS, *supra* note 9, at 135.

<sup>168</sup> See Larminie, *supra* note 24, at 80.

<sup>169</sup> See SAHURIE, *supra* note 6, at 428.

<sup>170</sup> See *id.*

<sup>171</sup> See *id.* at 429–30.

<sup>172</sup> See *id.* at 430–31.

<sup>173</sup> See *id.* at 431.

<sup>174</sup> See SAHURIE, *supra* note 6, at 428–33.

<sup>175</sup> Madrid Protocol, *supra* note 98, art. VII.

<sup>176</sup> See Larminie, *supra* note 24, at 87 (conjecturing about Antarctica's mineral resource potential).

<sup>177</sup> See Hussain, *supra* note 91, at 89; JOYNER, *supra* note 1, at 264.



troversial argument posits that areas that cannot be owned by any nation should be regulated for the benefit of all nations.<sup>178</sup> Even before the theory was discussed in the 1970s,<sup>179</sup> the 1959 Antarctic Treaty reflected its ideals.<sup>180</sup> The preamble “[r]ecogniz[es] that it is in the *interest of all mankind* that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord” (emphasis added).<sup>181</sup> While the Treaty does not overtly state that Antarctica is owned by all nations, it does resonate with the idea that all nations have an “interest” in Antarctica.<sup>182</sup> The 1991 Madrid Protocol also adopted some of the common heritage principle ideals, but it did not go so far as to officially adopt the common heritage principle.<sup>183</sup> The Protocol does, however, “designate Antarctica as a natural reserve, devoted to peace and science.”<sup>184</sup> The U.N. alluded to the principle in a 1991 General Assembly Resolution which “[a]ffirm[ed] its conviction that, in the interest of all mankind, Antarctica should continue for ever to be used exclusively for peaceful purposes and that it should not become the scene or object of international discord . . . .”<sup>185</sup> If applied in Antarctica, the principle would require that the world community obtain ownership rights, including mineral resource rights, in Antarctica.<sup>186</sup> Any country choosing to exploit Antarctica’s mineral resources would have to share its profits with the entire world.<sup>187</sup> The only official adoption of the CHM principle was in the 1982 United Nations Convention on the Law of the Sea, which applied to the deep-sea bed.<sup>188</sup> Therefore, whether CHM is an international standard is highly debatable, since it has only been applied in one context thus far, and in that context it was considered a failure.<sup>189</sup> The ATS, which evokes the CHM with its language regarding the “interest of all mankind,” does not expressly

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<sup>178</sup> See SAHURIE, *supra* note 6, at 369.

<sup>179</sup> See PETERSON, *supra* note 13, at 119.

<sup>180</sup> See Charney, *supra* note 82, at 80.

<sup>181</sup> Antarctic Treaty, *supra* note 10, pmbl. (emphasis added); see Beeby, *supra* note 10, at 5.

<sup>182</sup> See Antarctic Treaty, *supra* note 10, pmbl.

<sup>183</sup> See Madrid Protocol, *supra* note 98, art. II.

<sup>184</sup> *Id.*

<sup>185</sup> G.A. Res. 46/41, *supra* note 127, pmbl.

<sup>186</sup> See JOYNER & THEIS, *supra* note 9, at 168.

<sup>187</sup> *Id.*

<sup>188</sup> See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>189</sup> SAHURIE, *supra* note 6, at 443.

invoke its attendant consequences: shared profits from mineral resources in Antarctica.<sup>190</sup>

### E. *Designation of Antarctica as a "Global Commons"*

The ATS is recognized for its novel approach to a global commons area.<sup>191</sup> The System has even served as a model for other international "commons", such as Outer Space.<sup>192</sup> There are six characteristics of "global commons":

- (1) The area is physically and legally situated beyond the limits of national jurisdiction. (2) There are no recognized or valid national sovereignty claims that pertain to the area. (3) The area is presumed to be indivisible, and not politically enclosable . . . . (4) . . . universal access to the area. (5) The effects of abuse or mismanagement of the area are experienced universally . . . . (6) The risk to the commons area increases when states or their nationals conduct activities there.<sup>193</sup>

A main problem in defining Antarctica as a "global commons" concerns the second characteristic.<sup>194</sup> If one looks at how Antarctica is treated, then it is not a "global commons" since some countries have sought to claim it, and some reserve the right to claim it in the future.<sup>195</sup> Since the Treaty freezes the territorial claims, however, Antarctica is treated *as if* no nation owns it.<sup>196</sup>

The 1980 World Conservation Strategy mentioned Antarctica and its status as a "global commons" in its efforts to ensure that economic development is coupled with sound conservation practices.<sup>197</sup> It defined a "global commons" as "parts of the earth's surface beyond national jurisdictions—notably the open ocean and the living resources

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<sup>190</sup> See Charney, *supra* note 82, at 80; SAHURIE, *supra* note 6, at 441.

<sup>191</sup> See JOYNER & THEIS, *supra* note 9, at 33–34; Triggs, *supra* note 37, at 54–55 (highlighting the unique features of the ATS, including the fact that Antarctica is the first nuclear-free zone in the world).

<sup>192</sup> See generally Rosanna Sattler, *Transporting a Legal System for Property Rights: From the Earth to the Stars*, 6 CHI. J. INT'L L. 23 (2005).

<sup>193</sup> JOYNER, *supra* note 1, at 30.

<sup>194</sup> See *id.* at 19, 30.

<sup>195</sup> See *id.*; SUTER, *supra* note 3, at 16 (explaining that the United States and Russia have reserved the right to claim Antarctica).

<sup>196</sup> See JOYNER, *supra* note 1, at 47.

<sup>197</sup> See SUTER, *supra* note 3, at 113.

found there—or held in common—notably the atmosphere.”<sup>198</sup> Policymakers are primarily concerned with global commons spaces because of the potential for humans to exploit the resources in those spaces to the detriment of the global environment.<sup>199</sup> Economic benefits, therefore, are more the hallmark of CHM than they are of the “global commons” theories.<sup>200</sup>

#### F. *Status of Antarctica as a “World Park”*

Non-governmental organizations (NGOs) and the U.N. endorse the idea that Antarctica should be a world park.<sup>201</sup> In a 1991 General Assembly Resolution, the U.N. alluded to some Consultative parties that share in this view by “[w]elcoming the increasing support, including by some Antarctic Treaty Consultative Parties, for the establishment of Antarctica as a nature reserve or world park to ensure the protection and conservation of its environment and its dependent and associated ecosystems for the benefit of all mankind.”<sup>202</sup> While the world park view incorporates many of the ideas already practiced in Antarctica, such as the promotion of science and peace, the thrust of the world park concept is the environment.<sup>203</sup>

Greenpeace has been very active in advertising its belief that Antarctica should be designated a world park.<sup>204</sup> Looking at the values it sets forth in achieving this agenda helps elucidate the characteristics of a world park.<sup>205</sup> Greenpeace promotes four principles pertaining to Antarctica.<sup>206</sup> All four principles echo the current status of the ATS policy in Antarctica.<sup>207</sup> The first Greenpeace principle makes the environment of paramount concern; the second advocates “complete protection of Antarctica’s wildlife”; the third wishes Antarctica to remain “a zone of international scientific co-operation”; and the fourth wishes Antarctica to remain peaceful and weapon-free.<sup>208</sup>

<sup>198</sup> See *id.* at 114.

<sup>199</sup> See *id.* at 115.

<sup>200</sup> See Eric Suy, *Antarctica: Common Heritage of Mankind?*, in *THE ANTARCTIC ENVIRONMENT AND INTERNATIONAL LAW*, *supra* note 26, at 94.

<sup>201</sup> PETERSON, *supra* note 13, at 118; G.A. Res. 45/78, *supra* note 43, pmbl.

<sup>202</sup> G.A. Res. 46/41, *supra* note 127, pmbl.

<sup>203</sup> See Berguno, *supra* note 46, at 106.

<sup>204</sup> See JOYNER & THEIS, *supra* note 9, at 128.

<sup>205</sup> See *id.* at 128–29.

<sup>206</sup> SUTER, *supra* note 3, at 134–35.

<sup>207</sup> See *id.*

<sup>208</sup> *Id.*

The recent Madrid Protocol embodies the first principle, since it creates an environmental protocol that effectively sublimates all other interests to those of the environment.<sup>209</sup> The second principle was already accomplished in CCAML, as well as the Seals Convention.<sup>210</sup> The third and fourth principles were addressed even before Greenpeace began advocating its view that Antarctica should be a world park—the Treaty itself adopts peace and demilitarization as two of its goals.<sup>211</sup>

### III. ANALYSIS

#### A. *Eliminating Territorial Claims*

At a point when no particular nation stands to gain from exploitation of mineral resources in areas of Antarctica, Consultative Treaty parties should eliminate all claims and potential claims to sovereignty over Antarctica.<sup>212</sup> As it stands now, under the Madrid Protocol of 1991, mining in Antarctica is banned until 2048.<sup>213</sup> Nonetheless, Treaty parties have never attempted to eliminate the various types of territorial claims that exist in Antarctica.<sup>214</sup>

On the one hand, the freezing of territorial claims binds the entire ATS system together.<sup>215</sup> Unfortunately, as a result, all future compromises, recommendations, and protocols are predicated on that one, initial compromise.<sup>216</sup> The Treaty's goals of peace and scientific research, however, are not related to territorial claims to Antarctica, except insofar as they were politically bartered for one another.<sup>217</sup> These meaningless territorial claims should not continue to underlie current and future Antarctic measures.<sup>218</sup>

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<sup>209</sup> See Madrid Protocol, *supra* note 98, pmb., art. 3(1).

<sup>210</sup> See JOYNER, *supra* note 1, at 177–78. See generally CCAML, *supra* note 98; Seals Convention, *supra* note 102.

<sup>211</sup> See Antarctic Treaty, *supra* note 10, arts. I–III.

<sup>212</sup> See SAHURIE, *supra* note 6, at 303 (highlighting the precarious situation created by Article IV).

<sup>213</sup> See Madrid Protocol, *supra* note 98, art. 7; see also Entry Into Force, *supra* note 115.

<sup>214</sup> See SAHURIE, *supra* note 6, at 302–3.

<sup>215</sup> See JOYNER & THEIS, *supra* note 9, at 31.

<sup>216</sup> See Beeby, *supra* note 10, at 7.

<sup>217</sup> See Trolle-Anderson, *supra* note 12, at 59–60.

<sup>218</sup> See *id.*

### B. *Obstacles to Melting the Territorial Claims*

One explanation for the perpetuation of these claims is that change is hard to effectuate in a consensus-only environment.<sup>219</sup> One important reason for Consultative parties to relinquish claims over Antarctica is because those claims thwart the creation of Antarctic policy.<sup>220</sup> The failure of CRAMRA highlights this roadblock to policy-making.<sup>221</sup> Making it even more difficult to reach consensus, Consultative parties are those that can afford scientific research in Antarctica and therefore have no reason to entertain the viewpoints of those that cannot.<sup>222</sup> These nations can also afford the steep costs of mineral extraction in the harsh Antarctic conditions.<sup>223</sup> Consultative parties, then, are adamantly against the application of CHM to Antarctica.<sup>224</sup> The CHM principle demands that countries that can afford to do the work of mineral extraction also distribute the profits of any potential discoveries to countries that cannot.<sup>225</sup> Since countries with claims have no incentive to share the resources, they are essentially hoarding their frozen claims for the possibility that mineral resources will be discovered in the future.<sup>226</sup> By eliminating the incentive to hoard the frozen territorial claims, policymaking in Antarctica would be improved.<sup>227</sup>

#### 1. CHM

Despite the faults of the current system, the CHM does not adequately address the Antarctica situation.<sup>228</sup> The CHM principle is problematic not only for countries with claims, but for those without claims as well.<sup>229</sup> For example, as it has been implemented in the past, the CHM does not give enough deference to environmental concerns.<sup>230</sup> Instead, it focuses on sharing the benefits of mineral resources that exist in areas beyond national jurisdiction.<sup>231</sup> When preservation of the environment has become a paramount concern in Antarctica, as evi-

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<sup>219</sup> See SAHURIE, *supra* note 6, at 11.

<sup>220</sup> See SUTER, *supra* note 3, at 55–59.

<sup>221</sup> See *id.*

<sup>222</sup> See Hussain, *supra* note 91, at 91.

<sup>223</sup> See SAHURIE, *supra* note 6, at 428; SUTER, *supra* note 3, at 48.

<sup>224</sup> See JOYNER & THEIS, *supra* note 9, at 172.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> See Charney, *supra* note 82, at 80.

<sup>229</sup> See JOYNER, *supra* note 1, at 224; *infra* Part III.B.

<sup>230</sup> See JOYNER, *supra* note 1, at 224.

<sup>231</sup> See *id.* at 226.

denced by the Madrid Protocol and its ban on mining, CHM ceases to be helpful.<sup>232</sup>

## 2. World Park

Transforming Antarctica into a world park would not serve the interests of the ATS.<sup>233</sup> On the one hand, some Consultative parties are open to Antarctica being made into a world park.<sup>234</sup> One benefit of this internal movement towards world park status is that such status would necessarily render the territorial claims moot.<sup>235</sup>

One problem, however, with officially transforming Antarctica into a world park is that it could limit scientific studies on the continent, such as the CCAMLR Ecosystem Monetary Program (CEMP).<sup>236</sup> The current position created by the ATS strikes a healthy balance between protecting the environment and allowing Antarctica to be utilized for scientific knowledge.<sup>237</sup> Changing Antarctica into a world park would thus not mesh with the goal of the Antarctic Treaty that relates to scientific research.<sup>238</sup> The Consultative parties can, however, continue with the environmental protection scheme of the Madrid Protocol to ensure the protection of the Antarctic environment and, instead of declaring it a world park, just agree to drop the territorial claims.<sup>239</sup>

## 3. Clinging to Claims

Another problem with convincing Consultative parties to drop their territorial claims is that they have repeatedly articulated their interest in holding onto those claims.<sup>240</sup> For example, the Recommendations issued by the Consultative parties in 1977 and 1981 emphasized the continuance of Article IV, which suspended the resolution of all claims to sovereignty until an unspecified future date.<sup>241</sup> Specifically,

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<sup>232</sup> See Madrid Protocol, *supra* note 98, pmbl., art. VII; JOYNER, *supra* note 1, at 225 (mentioning that the CHM can impose environmental costs).

<sup>233</sup> JOYNER, *supra* note 1, at 174–75.

<sup>234</sup> See G.A. Res. 46/41, *supra* note 127, pmbl.

<sup>235</sup> See JOYNER & THEIS, *supra* note 9, at 31.

<sup>236</sup> See JOYNER, *supra* note 1, at 129, 174.

<sup>237</sup> See *id.* at 174–75.

<sup>238</sup> See *id.* at 174.

<sup>239</sup> See *id.*

<sup>240</sup> See generally Recommendation IX-1, Antarctic Treaty Consultative Meeting IX, Antarctic mineral resources (1977), available at <http://aspire.nvi.net/gendoc.plx?11=1977&db=1> [hereinafter Recommendation XI-1 (1977)]; Recommendation XI-1 (1981), *supra* note 96.

<sup>241</sup> See Recommendation IX-1 (1977), *supra* note 240, ¶ 5; Recommendation XI-1 (1981), *supra* note 96, pmbl.

Recommendation IX-1 expressly stated a desire to ensure that “the provisions of Article IV of the Antarctic Treaty shall not be affected by [a future mineral resources regime].”<sup>242</sup> In light of CRAMRA’s failure and the subsequent adoption of the Madrid Protocol with its fifty year ban on mining, the relevancy of all frozen claims is uncertain.<sup>243</sup> Especially when either consensus or a majority is required to *lift* the ban, the status quo seems to be that no one will be able to profit from a mineral resource being discovered within a latent territorial claim.<sup>244</sup> Because the system holds these claims in perpetual stasis, the claims these nations hold are essentially valueless.<sup>245</sup> Therefore, these claims should be dropped.<sup>246</sup>

### C. Additional Considerations

One major drawback of a proposal to drop all territorial claims is that it could cause the ATS to collapse.<sup>247</sup> Nonetheless, the flow of political pressure and the resulting Protocols have evidenced a paramount concern for the environment above any economic concerns.<sup>248</sup> The timing, therefore, seems ripe for such a change in the ATS.<sup>249</sup>

In addition, the elimination of territorial claims may or may not implicate increased U.N. involvement.<sup>250</sup> After the Madrid Protocol, nations advocating the CHM principle were less interested in Antarctica, since it seemed like there was no potential for resources to be exploited there.<sup>251</sup> Similarly, Consultative parties with claims or potential claims might lose interest in maintaining an independent system given the loss of the latent territorial claims.<sup>252</sup> On the other hand, seventeen nations were interested in becoming Contracting parties, which suggests some advantage to having the ATS function independent of the U.N.<sup>253</sup>

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<sup>242</sup> See Recommendation IX-1 (1977), *supra* note 240, pmb1.

<sup>243</sup> See Trolle-Anderson, *supra* note 12, at 59–60.

<sup>244</sup> See Charney, *supra* note 82, at 89.

<sup>245</sup> See Trolle-Anderson, *supra* note 12, at 59–60.

<sup>246</sup> See *id.*

<sup>247</sup> See PETERSON, *supra* note 13, at 2 (noting the instability of the ATS).

<sup>248</sup> See Charney, *supra* note 82, at 89–90.

<sup>249</sup> See *id.*

<sup>250</sup> See MYHRE, *supra* note 8, at 117.

<sup>251</sup> See JOYNER, *supra* note 1, at 164–65.

<sup>252</sup> See Trolle-Anderson, *supra* note 12, at 59–60.

<sup>253</sup> See JOYNER, *supra* note 1, at 49.

If the ATS breaks down over Article IV disputes, the outcome of the Article IV compromise would be uncertain.<sup>254</sup> The status of Antarctica—claimed, claimable, or unclaimable—would be up in the air.<sup>255</sup> For this reason, the ATS should adapt itself before mineral resources are discovered.<sup>256</sup> If Article IV were eliminated, there would no longer be uncertainty if the system were to cease.<sup>257</sup> Eliminating Article IV would effectively make Antarctica an unclaimable, global commons space.<sup>258</sup>

#### D. *The Solution of Meltdown*

With the elimination of Article IV, the revised Treaty would facilitate agreements concerning Antarctica's resources that truly are for the benefit of all nations.<sup>259</sup> The 1959 Antarctic Treaty has as its pre-eminent goals maintaining peace and the furtherance of scientific research in Antarctica and those goals should be reflected in all Antarctic policies.<sup>260</sup> Article IV, by setting aside territorial claims to the area, contradicts the goals of the Treaty by giving certain nations an incentive to maintain *possible* territorial claims.<sup>261</sup> Article IV prevents Antarctica from truly achieving "global commons" status, since it is held for the benefit of all, but also potentially for the benefit of just a few nations with territorial claims.<sup>262</sup>

This solution revises the CHM principle.<sup>263</sup> Rather than give every country an equal share of potential mineral resources profits in Antarctica, it gives all countries the greater benefit of preserving Antarctica for scientific and environmental benefit for years to come.<sup>264</sup> The focus, therefore, is less on monetary value, which is locked up anyway by the Madrid Protocol, and more on aesthetic and scientific value, which everyone can share without cost to another.<sup>265</sup> By denying claimant countries their territorial claims, everyone benefits from

<sup>254</sup> See SAHURIE, *supra* note 6, at 303.

<sup>255</sup> See *id.* at 304.

<sup>256</sup> See PETERSON, *supra* note 13, at 2.

<sup>257</sup> See *id.*

<sup>258</sup> See JOYNER, *supra* note 1, at 19.

<sup>259</sup> See SAHURIE, *supra* note 6, at 444.

<sup>260</sup> Antarctic Treaty, *supra* note 10, arts. I–III.

<sup>261</sup> See Triggs, *supra* note 37, at 53 (describing sovereignty as a "trump card" in negotiations).

<sup>262</sup> See JOYNER, *supra* note 1, at 44–47, 50.

<sup>263</sup> See *id.* at 32–34.

<sup>264</sup> See *id.* at 32–34.

<sup>265</sup> See *id.* at 49.



the certainty of Antarctica's continuance as a site of peace and scientific study.<sup>266</sup>

### CONCLUSION

Setting territorial claims aside worked to create an initial agreement on Antarctica, but it will not sustain sound future agreements. The international climate has changed and the environment has become more important than disputed territorial claims. Facilitated by the absence of territorial claims, the past fifty years have seen Antarctica become a peaceful and science-oriented international environment. The complete eradication of claims would guarantee that Antarctica stays peaceful and scientifically viable for years to come.

In the wake of CRAMRA's failure and the Madrid Protocol's success, it is evident that countries consider environmental issues to be of paramount concern in Antarctica. While granting Antarctica world park status could further that interest, it would contradict a very fundamental goal of the Antarctic Treaty: scientific research. Rather than declare Antarctica a world park, Treaty parties should eliminate the latent territorial claims in Article IV. While Antarctica has been treated as if it is a global commons, this would truly make Antarctica into a global commons space by removing any possibility of its ownership by a single nation.

With frozen territorial claims melted, the ATS would be in a position unlike one it has ever been in before. The frozen territorial claims were a barter chip for the incredible benefits of peace and scientific cooperation that stemmed from the 1959 Treaty. But the ATS should not be chained by its beginnings, only inspired by them. With national interests in Antarctic territory gone, the question of what to do with Antarctic mineral resources (if discovered) can be answered from a more global, equitable perspective.

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<sup>266</sup> *Id.* at 49; see Madrid Protocol, *supra* note 98, pmb1.